IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 541 of 1993

Balwant Punja Rajole

since deceased by his heirs:

1A Dayaram Balwant Rajole

1B Smt.Yamunabai Sukhdeo Nalvade

1C Smt.Kamalabai Waman Bhagat

1D Smt.Bhagirathibai Laxman Hagwane

1E Smt.Jaibai Lahanu Govardhane...Appellants

V/s

1. Mohanlal Khushlachand Bedmutha

2. Sout.Barjabai Chandulal tiolda

3. Sout.Bhagirathibai Nemciahnd Bohora

4. Gangabai Mangilal Dhadiwal

5. Baswantabai Dharamchand Bamb .. Respondents

Smt.Anita A. Agarwal for Appellants

Shri V.Z.Kankaria for Respondents

CORAM: S.R.SATHE,J.

DATED:15th September 2004

ORAL JUDGMENT :-

1. Being aggrieved by the judgment and order passed by the Court of the 4th Additional District Judge, Nasik in civil Appeal No.293 of 1987 whereby the judgment and order passed by the Court of the Civil Judge, J.D., Igatpuri in Regular Civil suit NO.48 of 1979 dismissing the plaintiff's suit for possession was set aside and the appeal was allowed and defendant was directed to hand over possession of the suit property, the heirs of original defendants have preferred this second Appeal.

2. For the sake of convenience hereinafter parties shall be referred to as the plaintiffs and defendants.

3. The brief facts giving rise to this appeal are as under :-

. The agricultural land bearing Survey no.765 situated at village Wadhiwahre, Taluka Igatpuri was initially owned by defendant and his father. On 18-2-1938 land admeasuring 27 gunthas out of Survey NO.765 was purchased by plaintiff's father from the defendant and his father. According to the plaintiffs, who are the heirs of original purchaser Khushalchand Poonamchand, the said land was in

possession of plaintiff's father right from the sale deed. Further in the yea 1978 the defendants forcibly obtained possession of the suit land through plaintiff's vahiwatdar Mohan Ramji Gaikar. Plaintiffs, therefore, issued notice dated 8-1-1979 to the original defendant and called upon him to hand over possession of the suit land and also claimed damages to the extent of Rs.1,000/-.

4. The original defendant filed his written statement at Exh.10 and resisted the suit claim. The defendant admitted that present plaintiffs are the heirs of Khushalchand Punamchand. However, denied the plaintiff's allegation that the suit land was purchased by plaintiff's father and he was put in possession of the same. The defendant further contended that neither the plaintiff nor Mohan Ramji Gaikar were in any way concerned with the suit land and the allegation of the plaintiff that defendant took forcible possession of the suit land through or at the instance of Mohan Ramji Gaikar is false. Defendant further contended that on receipt of notice from the plaintiff he had been to the plaintiffs and asked them as to how false notice was issued by them. However at that time plaintiff's told him that due to misudnerstanding such notice was issued but they will not take any action. Hence the defendant did not give any reply to the plaintiff's notice. The

defendant denied plaintiff's allegation that he is getting income of about Rs.1,000/- per year from the suit land. The defendant contended that the suit land is his ancestral land and the same is in possession of the defendant for last about 50 years. All along the revenue assessment of the suit land has been paid by the defendant and his name has been entered in the record of rights. Thus according to the defendant neither plaintiffs nor their father were in any way concerned with the suit land. In the alternative the defendant contended that the suit land is in possession of the defendant for more than 12 years continuously, openly, peacefully and in denial to the title of the owner and as such he has become owner of the same by virtue of adverse possession. The defendant therefore contended that the plaintiff is not entitled to get the possession and the suit is barred by law of limitation. Hence on all these grounds the defendant prayed for dismissal of the suit.

5. On these pleadings the learned trial Judge framed issued at Exh.11. After considering the evidence on record the trial Court came to the conclusion that the plaintiff has failed to prove his title to the suit property and on the contrary the suit property is owned by the defendant. The trial Court also observed that in the alternative it appears that the

defendant has become owner of the suit land by virtue of adverse possession. He therefore, held that the plaintiff is not entitled to get possession as prayed. Hence the plaintiff's suit for possession was dismissed.

6. The plaintiff challenged the above mentioned order in Civil Appeal No.293 of 1987. After hearing the arguments of both the learned Advocates the first appellate court came to the conclusion that the plaintiff has proved his title to the suit property. As against this the defendants have failed to prove that the land is owned by them or that they have become owners by adverse possession. The first appellate court, therefore, allowed the appeal and decreed the suit in plaintiff's favour.

7. The heirs of original defendant have challenged the above mentioned order passed by the first appellate court in this Second appeal. The only substantial question of law involved in this appeal is whether the plaintiffs have proved that they are owner of the suit property and as such entitled to get possession.

8. In this appeal before me the learned Advocate for the Appellant has urged only two points. Firstly she submitted that first appellate court has wrongly

relied on the sale deed purchased by the plaintiff and held that the plaintiff has become owner of the suit land by virtue of the sale deed. Secondly she canvassed before me that even if it is assumed that plaintiff had proved his title over the suit land by virtue of sale deed, still then, there is absolutely no evidence to show that the defendants took forcible possession as alleged by the plaintiff and on the contrary there was abundant evidence to show that the defendant and his predecessor were in possession of the suit land for continues 50 years as owner of the land and as such first appellate court should have negatived the plaintiff's claim atleast holding that the defendants have become owners of the suit land by virtue of adverse possession. As against this Snri Kankaria,learned Advocate for the Respondent plaintiff supported the judgment and order passed by the first appellate Court.

9. Admittedly, the plaintiff has come out with a definite case that land bearing Survey No.765 situated at village Wadhivale was initially owned by the defendant and his father and out of said land plaintiff's father purchased 27 gunthas of lands described in detail in para 1 of the plaint by virtue of a registered sale deed dated 18-2-1938. However, if we peruse the sale deed which is at Exh.31 we find that it is nowhere specifically mentioned in the sale

deed that the land bearing Survey NO.765/3 has been purchased by the plaintiff's father under the said sale deed. In fact, the plaintiff has also clearly admittedly accordingly in his deposition. Not only that but he was not even specifically stated as to what was the area of land, that was purchased under the sale deed. So one thing is certain that sale deed by itself is definitely not sufficient to hold that the plaintiff is the owner of the suit property bearing Survey No.765/3.

10. It appears that it is the case of the plaintiffs that after the land was purchased by the plaintiff's father there was sub division of original survey no.765 and in the said sub division the land which was purchased by the plaintiff's father was given No.765/3. Naturally, the burden lies on him to prove that the land under sale deed was numbered as 765/3. However, it must be noted that the plaintiff has not adduced any evidence worththename to show that the land under said sale deed has been numbered as 765/3. From the perusal of the mutation entry no.1335 dated 1-4-1938 it does appear the name of plaintiff's father was entered as owner in respect of some portion of the land out of Survey No.765 but that by itself is not sufficient to prove the plaintiff's claim in this suit. On the contrary from the subsequent mutation entry No.1514 Exh.32 it appears

that Potphalni of Survey No.765 took place in the year 1942 and at the time of said Phalni the land bearing NO.765/3 is shown in the name of Balwant Punja Rajole i.e. defendant. Then it must be noted that acreage of the said land is shown as 21 gunthas. Admittedly, the sale deed Exh.31 dated 18-2-1938 was in respect of land admeasuring 27 gunthas so there is absolutely nothing on record to show that 21 gunthas land shown as S.No. 765/3 is part of the land which was purchased by the plaintiff's father in 1938. The plaintiff has come out with a case that in Phalni less area was shown in respect of NO.765/3. In fact, had it been so, we would have found the name of plaintiff's father as owner of 765/3. On the contrary we find that name of Khushalchand Punamchand i.e. father of plaintiff was shown as Kabjedar for the land bearing Survey No.765/1 along with Bapu V. Kanore. So this also indicates that land bearing No.765/3 even after Photphalni in the year 1942 was not at all owned and possessed by the plaintiff's father.

. Even if we see the boundaries of the suit land given by the plaintiff in the plaint and boundaries of the land purchased by the plaintiff under the said sale deed it is clear that the same do not tally. Thus the sale deed dated 19-2-1938 does not prove plaintiff's ownership over the suit land.

11. Incidently it must also be noted here that plaintiff has not produced even a single 7x12 extract to show that name of plaintiff's father was entered as holder of the land bearing S.No.765/3 and that the said land was in actual possession of plaintiff's father. As against this the defendants have produced at Exh.34,35,42, 43 and 57 7x12 extracts of the suit land bearing S.No.765/3. From these extracts it is very clear that name of the defendant is appearing in the said extracts as owner and the person in possession for the period from 1944 to 1987. If really the plaintiff would have purchased the land in question and was also put in possession of the same then certainly plaintiff's father would have taken immediate action against the defendant finding that his name was entered in the record of rights as owner and person in possession, but admittedly no such steps were taken by the plaintiffs at any time.

12. There is yet another circumstance which would also indicate that land in question is owned by the defendant and not by the plaintiffs. The defendant have produced at Exh.58 the Copy of a declaration made by the defendant under Co Op. Scy Act which would indicate that as defendant had obtained loan charge of the said loan was kept on various lands owned by the defendant including the land bearing

s.No.765/3. Then it has also come on record that even after the time the consolidation scheme was made applicable to the said village the land in question was included in Gat NO.1145 and it was shown as property owned by the defendant. So, from all this evidence it is crystal clear that plaintiffs have in fact failed to prove that land in question i.e.s.No.765/3 was purchased by the plaintiff's father and after his death plaintiff have become owner of the same. Once it is said that plaintiff has failed to prove their title to the suit property, the question of granting any relief in plaintiff's favour does not arise. So, it is very clear that finding recorded by the first appellate court in this behalf was not correct and the finding recorded by the trial Court was legal and correct. It appears that first appellate court has wrongly observed that it was the duty of the defendant to show that land which was sold by the defendant to plaintiff's father was not 765/3 but it was other land.

13. In view of the fact that the plaintiffs have failed to prove their title to the suit property and the evidence on record, shows that land in question is owned by the defendant, the question of defendant becoming owner by adverse possession does not arise. However, even if it assumed that finding regarding ownership of the plaintiff recorded above is not

correct and land is in fact owned by the plaintiff still then one thing is certain that the land in question is continuously in possession of the defendant from the year 1944. Not only that all along the said land is cultivated by him as owner and his name has been entered in the record of rights in the column of Kabjedar as well as the in the column of Vahiwat. He has also created charge on the said land when he obtained loan from Co Op societies. So

if at all it is held that plaintiff is owner of the said land then certainly it has to be held that the land in question is in possession of the defendants openly, peaceably, continuously and in demand of plaintiff's title for more than statutory period and as such all essential ingredients of adverse possession are fulfilled by the defendant and hence plaintiffs would not be entitled to possession of the suit property. In any event, the finding recorded by the first appellate court that the plaintiff is the owner and as such entitled to get possession is not legal and correct. It is therefore, necessary to interfere with the said finding and set aside the order passed by the first appellate court.

14. In this view of the matter the appeal is allowed. The order passed by the 4th Additional District Judge, Nasik in Civil Appeal No.293 of 1987

is set aside and the plaintiff’s suit is dismissed.

. Under the circumstances of the case, parties to bear their own costs.

. Certified copy expedited.

(S.R.SATHE, J.)